Associated Milk Producers, Inc. *and* Truck Drivers, Chauffeurs, Warehousemen and Helpers, Local Union No. 941, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.[1] Case 28–CA–7857

October 24, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On a charge filed by the Union on July 17, 1984, the General Counsel of the National Labor Relations Board issued a complaint on August 22, 1984, against the Respondent, Associated Milk Producers, Inc., alleging that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Respondent filed a timely answer, admitting in part and denying in part the allegations of the complaint.

The complaint alleges that about July 5, 1984, the Respondent failed and refused to bargain with the Union as the exclusive collective-bargaining representative of the unit by ceasing to make its contributions to the Central States, Southeast and Southwest Areas Pension Fund (Pension Fund), as provided for in the most recently expired collective-bargaining agreement. The Respondent engaged in this conduct unilaterally and without the agreement, consent, or acquiescence of the Union.

On October 9, 1984, the parties jointly moved the Board to transfer the proceedings to the Board, without benefit of a hearing before an administrative law judge, and submitted a proposed record consisting of the formal papers and the parties' stipulation of facts with attached exhibits. On January 7, 1985, the Executive Secretary, by direction of the Board, issued an order granting the motion, approving the stipulation, and transferring the proceedings to the Board. Thereafter, on March 11, 1985, the General Counsel filed a brief. On March 12, 1985, the Respondent filed a brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in the case, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Associated Milk Producers, Inc., a Kansas corporation, with an office and place of business in El Paso, Texas, is engaged in the business of marketing milk. In the course and conduct of its business operations in Texas, the Respondent, in a period representative of its operations at all times, purchased and received products, goods, and materials valued in excess of $50,000 directly from places outside the State of Texas. During the same period, the Respondent sold and shipped from its El Paso facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Texas. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We further find that the Union, Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 941, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

The issue presented is whether the Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing to make its contributions to the Pension Fund, as provided for in the parties' most recently expired collective-bargaining agreement.

A. *Facts*

On October 3, 1979, the Union was certified as the collective-bargaining representative of a bargaining unit of truck drivers, helpers, maintenance men, and lab technicians. The latest collective-bargaining agreement between the Respondent and the Union was effective from October 7, 1983, through May 3, 1984. Article 23 of the agreement provided that the Respondent would make certain contributions to the Pension Fund.

On February 27, 1984, the Union sent the Respondent a letter requesting modification of the agreement. On March 2, 1984, a decertification petition was filed in Case 28–RD–466. On March 8, 1984, the Respondent sent the Union a letter acknowledging receipt of its February 27 letter and confirming the Respondent and the Union's agreement to hold contract negotiations in abeyance pending disposition of the representation matter. On March 9, 1984, the Respondent and the Union executed a Stipulation for Certification Upon Consent Election.

The first decertification election was held on April 5, 1984; there were 13 votes cast for the Union, 14 cast against the Union, with no challenged ballots. On April 12, 1984, the Union filed objections to the election. On May 11, 1984, the hearing officer recommended that the election be set aside and a new election be held.

The parties' collective-bargaining agreement expired on May 3, 1984. The Respondent made all pension fund payments due to the Pension Fund for May 1984, and all preceding months. Following the expiration of

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. The caption has been amended to reflect that change.

the agreement, the Respondent ceased making pension fund payments. On July 5, 1984, the Respondent sent the Union a letter in which it stated that it did ''not intend to continue to make contributions to the Central States, Southeast and Southwest Areas Pension Fund.''

The Respondent did not make the pension fund contribution for the month of June, which was due about July 15, 1984. On July 17, 1984, the Union filed a charge with the Regional Office alleging an 8(a)(5) violation.

On August 1, 1984, the Union sent the Respondent a letter indicating that it had filed a charge with the Board. On September 18, 1984, the Board adopted the hearing officer's recommendation that the election be set aside, and ordered a second election. The second decertification election was held on October 18, 1984. There were 14 votes cast for the Union, 16 against, with no challenged ballots or objections. A Certification of Results issued on October 26, 1984.

B. *Contentions of the Parties*

1. General Counsel's contentions

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing pension fund contributions from June 1 to October 26, 1984. The General Counsel notes that although an employer's contractual obligations cease with the expiration of the contract, the terms and conditions of employment established by the contract and terms governing the employer-employee relationship survive contract expiration. Fringe benefit contributions, such as contractually established pension fund payments, are a term and condition of employment which survive contract expiration. The General Counsel contends, therefore, that the Respondent could not cease making pension fund contributions to the Pension Fund, in the absence of a union waiver, a good-faith impasse, or the Union's loss of majority status.

The General Counsel argues that the unfair labor practice arose when the Respondent, within 10 days of its July 5, 1984 proposal, implemented the proposal without providing the Union an effective opportunity to bargain over the unilateral change.

Although the Union did not respond to the July 5 letter until August 1, 1984, the General Counsel asserts that this is not evidence of waiver by the Union in light of the Union's having filed an unfair practice charge on July 17, immediately after the due date for the June pension contributions.

The General Counsel also argues that there can be no claim of a good-faith bargaining impasse because there was no bargaining over the discontinuation of the pension fund payments. The General Counsel contends that the Respondent could not have believed that the matter could be effectively negotiated within the short time between the day the July 5 letter was received by the Union and July 15, the last day on which the June pension fund contributions could be timely paid.

According to the General Counsel, following the expiration of its collective-bargaining agreement, the Union enjoyed a rebuttable presumption of majority support. The General Counsel argues that the Respondent has not sustained its burden of proving any actual loss of majority status by the Union or that the Respondent had a good-faith belief, based on objective considerations, of the Union's loss of majority status prior to Respondent's July 15 commencement of the unilateral change. The General Counsel maintains that neither the filing of the March 2 decertification petition nor the results of the April 5 decertification election is sufficient to rebut the Union's presumption of majority support.

The General Counsel argues that postelection unilateral changes made prior to a Board certification are unfair labor practices.[2] The General Counsel states that a finding of no unfair labor practice based on subsequent election results could reward and encourage employers to risk engaging in unilateral changes that could affect the election process. The General Counsel requests a make-whole remedy from June 1, 1984, the first month in which the Respondent did not make its pension fund contribution, to October 26, 1984, the date the Certification of Results issued.

2. Respondent's contentions

The Respondent agrees with the General Counsel that pension fund plans are an aspect of an employee's terms and conditions of employment that survive the expiration of the collective-bargaining agreement. The Respondent further agrees that an employer may not unilaterally alter its payments into those plans unless (1) the change has been made subsequent to a bargaining impasse and the union has rejected the change prior to the impasse, or (2) the union does not represent a majority of the unit employees, or the employer has a good-faith doubt, based on objective considerations, of the union's continuing majority status, or (3) the union has waived its right to bargain regarding the change.

The Respondent maintains that the Union waived its right to protest the discontinuation of the payments because it waited 3 weeks after the notification of the intended discontinuation to respond to the Respondent's letter. Further, the Respondent observes that the Union's response was that the Respondent's change was illegal, which was not an outright objection to the change.

[2] In support, the General Counsel cites *Dow Chemical Co.*, 250 NLRB 756 (1980), enf. denied 660 F.2d 637 (5th Cir. 1981), and *Presbyterian Hospital*, 241 NLRB 996 (1979).

The Respondent also maintains that on July 15, because of the results of the decertification election, it ''knew for certain'' that the Union no longer enjoyed majority support in the unit. The Respondent maintains that it had a good-faith doubt, based on objective considerations, of the Union's continued majority support.

The Respondent states that the Board has a rule that in the absence of compelling economic considerations for doing so, an employer acts at its peril in making a change in terms and conditions of employment during the period that objections to an election are pending and the final determination has not been made.[3] The Respondent argues that it ''acted at its peril'' when it made the change, during the postelection/precertification period, but that the Board only finds a violation when a certification of representative issues, not as in this case, when a certification of results issues. The Respondent argues that it acted at its peril in making the change, but that there was no violation because the Union lost the second decertification election. The Respondent thus contends that it did not violate the Act.

C. *Discussion*

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by making a unilateral change in the employees' terms and conditions of employment. Both parties have stipulated that the Respondent ceased making pension fund contributions and that the contributions were a term and condition of employment that survived the expiration of the collective-bargaining agreement. The General Counsel contends that the Respondent's change violated the Act. The Respondent contends that its action was lawful. We agree with the Respondent that the cessation of pension fund contributions did not violate the Act for the following reasons.

We find, as contended by the Respondent, that the Union waived its right to bargain over the cessation of payments. Here, at times material, the parties' collective-bargaining agreement had expired.[4] In that circumstance, an employer's obligation, prior to making a change in the terms and conditions of employment, is to give notice of its planned change and afford a reasonable opportunity for bargaining.[5] If an employer meets its obligation and the union fails to request bargaining, the union will have waived its right to bargain over the matter in question. *Gibbs & Cox, Inc*., 292 NLRB 757 (1989); *Citizens National Bank of Willmar*, 245 NLRB 389 (1979).[6]

Here, the Respondent, by letter dated July 5, 1984, notified the Union that it did not intend to continue its contributions to the Pension Fund. The Respondent's next payment was due on or about July 15. The Respondent concluded its letter by stating: ''[i]f you have any questions concerning our proposal or in any manner care to discuss this matter with me [Respondent's attorney], please feel free to call me.''

Despite being notified beforehand of the Respondent's intended change, the Union failed to request bargaining—both before and after the Respondent implemented the change. Consistent with its announcement to the Union, the Respondent did not make a pension fund payment in July. The Union did not communicate with the Respondent until August. In its letter dated August 1 to the Respondent, the Union did not request bargaining.[7] Rather, the Union stated that its position was that discontinuing the contributions ''would be illegal.'' The letter further stated that the Union had filed unfair labor practice charges regarding the matter.[8]

The Union's filing an unfair labor practice charge did not relieve it of its obligation to request that the Respondent bargain over the proposed change. In *Citizens National Bank*, supra, 245 NLRB 389–390, the Board stated:

> It is well established that it is incumbent upon a union which has notice of an employer's proposed change in terms and conditions of employment to timely request bargaining in order to preserve its right to bargain on that subject. The union cannot be content with merely protesting the action or filing an unfair labor practice charge over the matter. [Fns. omitted.]

[3] In support, the Respondent cites *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

[4] As noted, the parties' collective-bargaining agreement expired at midnight on May 3, 1984, and the parties had agreed to postpone negotiations for a successor agreement pending disposition of the representation matter.

[5] See, e.g., *Owens-Corning Fiberglas Corp*., 282 NLRB 609 fn. 1 (1987).

[6] In *Gibbs & Cox*, an employer gave a union approximately 2 weeks' notice that it intended to discontinue payments to a major medical plan. Thereafter, the union failed to request bargaining and the changes were implemented. Based thereon, the Board concluded that the union had waived its right to bargain.

Similarly, in *Citizens National Bank*, an employer announced to union representatives and employees that it would be changing work schedules about a week later. Finding that the union had failed to request bargaining about the change, the Board concluded that the employer had not violated Sec. 8(a)(5) of the Act.

[7] In the letter, Union President and Business Manager Diaz stated that he had twice attempted to contact the Respondent to discuss the contributions to the Pension Fund, and that one of the attempted contacts was on August 1. This assertion regarding unsuccessful attempts to contact the Respondent, however, falls far short of establishing that Union had requested, or was requesting, bargaining about discontinuing payments to the Pension Fund.

[8] As noted, the charge was filed on July 17.

Thus, it was incumbent on the Union to request bargaining—not merely to protest or file an unfair labor practice charge.[9]

We find that the Union waived its right to bargain about the cessation of the payments to the Pension Fund by failing to request bargaining after it was informed by the Respondent of the intended change.[10] Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

[9] *WPIX, Inc.*, 299 NLRB 525 (1990) a Board majority concluded that an employer did not violate Sec. 8(a)(5) by unilaterally implementing a change in its mileage-reimbursement rate. The employer announced its intention about 3 weeks prior to the change. Although the union learned of the intended change, it failed to request bargaining. After the employer implemented the change, the union filed an unfair labor practice charge. Nonetheless, the Board concluded that the union had failed to request bargaining and thus acquiesced in the employer's change.

Chairman Stephens dissented in *WPIX*, and he adheres to his dissent. In *WPIX*, the Chairman concluded that the union could properly view the employer's announced change as a fait accompli. The Chairman relied on several factors, most notably that the employer did not inform the union of its intentions but rather announced its change directly to the employees. In *WPIX*, the union learned of the intended change only through fortuitous circumstances. Here, the Chairman notes, unlike in *WPIX*, the Respondent communicated directly with the Union prior to making the change.

[10] Having found that the Union waived the right to bargain, we need not decide whether the Respondent was privileged to make its unilateral change because of the results of the decertification elections in Case 28–RD–466.